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No. 98-1714

IN THE
SUPREME COURT OF THE UNITED STATES

FULL GOSPEL TABERNACLE and JORGE VEGA,
Pastor of Full Gospel Tabernacle,

Petitioners,

v.

COMMUNITY SCHOOL DISTRICT 27, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

This case presents the question whether a governmental body may deny a community group equal access to the use of its facilities for the sole reason that the intended use, while otherwise permissible, may be characterized as "religious services or religious instruction."

The petitioners -- a church and its pastor -- sought equal access to the use of school district facilities during nonschool hours. Respondents concede that churches are eligible speakers, Opp.[1] at 23 ("The Church is free . . . to conduct secular activities on public school grounds"), and that religion is a permissible subject matter, Opp. at 4 (school district regulation permits "the use of school premises by outside organizations . . . for the purpose of discussing religious material or material which contains a religious viewpoint") (quoting Standard Operating Procedures Manual [SOPM] section 5.9; see App. 34a), for after-hours use of school district facilities. Respondents also concede that they denied equal access to petitioners for the sole reason that petitioners' intended expressive activity could be characterized as worship, Opp. at 2 (access "was denied because of the Board's policy prohibiting the use of school facilities for religious worship services"). In short, respondents excluded an otherwise permissible expressive use (speech, music, instruction) because of its forbidden religious perspective (viz., that of worship). See generally Pet. at 7-8.

By upholding this blatantly unconstitutional discrimination, the Second Circuit rendered a decision in square

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[1] "Opp." refers to the Brief in Opposition. "Pet." refers to the Petition for Certiorari. "App." refers to the Appendix to the Petition.

conflict with decisions of the First, Third, Fourth, Seventh, Eighth, and Tenth Circuits, Pet. § I, and in square conflict with the decisions of this Court, Pet. § II. Respondents' brief in opposition, if anything, only highlights the need for Supreme Court review.

1. Conflict in the Circuits

The respondents deny, with in essence an ipse dixit, the existence of a conflict between the decision below and the decisions of other federal circuits. Indeed, respondents scarcely do more than list the conflicting cases and describe (often incorrectly) their holdings.

For example, respondents note that in Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir.), cert. denied, 511 U.S. 1143 (1994), the Fourth Circuit "struck down a policy under which schools charged religious groups a higher rental fee than non-religious groups," Opp. at 16. But respondents fail to note that the issue in Fairfax Covenant was whether a school board could, consistent with the Constitution, deliberately discourage (by discriminatory rental rates) long-term use of school facilities for church worship services. See 17 F.3d at 707-08. The Fourth Circuit held that the Constitution neither required nor permitted discrimination against church access to school facilities for worship services. Id. at 706-09. In direct conflict with Fairfax Covenant, the Second Circuit below approved the discriminatory total exclusion of worship services from after-hours use of school facilities.

To take a second example, respondents badly mischaracterize Gregoire v. Centennial School District, 907 F.2d 1366 (3d Cir.), cert. denied, 498 U.S. 899 (1990).

Respondents would treat Gregoire as merely holding that if a school allows "religious speech in the afternoon," then it must also allow "religious speech in the evening," Opp. at 16. In fact, Gregoire held that both religious speech and worship services fall within the right to equal access to school facilities after hours. The "speech in the afternoon," upon which respondents focus, was a forum for students under the Equal Access Act, see 907 F.2d at 1373, a federal statute that applies with equal force to respondents. See generally Board of Educ. v. Mergens, 496 U.S. 226 (1990). More importantly, the Gregoire court rejected the central premise of the decision below. Respondents' discriminatory exclusion of religious worship, but not religious speech, requires (as respondents concede) school districts "to make difficult distinctions between [forbidden] religious worship services and [permitted] other forms of religious speech," Opp. at 14. The Second Circuit in the present case approved discrimination based on this supposed distinction between religious worship and religious speech. App. 2a, 21a n.9, 24a. The Gregoire court explicitly rejected the this very same distinction:

> Attempting to draw a line between religious discussion and worship would only exacerbate establishment clause concerns, requiring [the school district] to entangle itself in what would almost certainly be complex content-determinations.

907 F.2d at 1382. Hence, the conflict with the Second Circuit's decision below could not be more patent.

2. Conflict with the Supreme Court

The Second Circuit below upheld the discriminatory exclusion of otherwise includible expressive activities (singing,

meeting, discussing religious topics) conducted by an otherwise eligible community group (petitioner church) for the sole reason that the expressive activities would be undertaken from the perspective of offering worship to God. The Second Circuit's condoning of such governmental hostility to core religious speech and exercise runs directly contrary to this Court's decisions in the areas of free speech, free exercise of religion, freedom from hostility to religion under the Establishment Clause, and freedom from invidious discrimination under the Equal Protection Clause. See Pet. § II.

a. Parade of horribles

Respondents seek primarily to defend the decision below by pointing to a supposed parade of horribles. According to respondents, if governmental discrimination against private worship services is unconstitutional, then all schools that allow any outside speakers must allow church services as well. E.g., Opp. at 13, 14, 19-20, 22, 24. Respondents employ fallacious reasoning.

First of all, a school need not open its facilities to outside users at all. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 391 (1993) ("the District need not have permitted after-hours use of its property for any of the [authorized] uses"). Second, if a school invites a particular speaker -- for example, an opponent of teen smoking, Opp. at 14 -- that speaker acts as an agent of the school, and no forum is thereby created for private speech (e.g., a defense of smoking). Rosenberger v. Rector of University of Virginia, 515 U.S. 819, 833 (1995) ("we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message"). Third, fears about perpetual church use of school

facilities, Opp. at 19-20, represent a red herring: schools can certainly impose neutral limitations on the duration or frequency of uses, i.e., so long as those restrictions do not single out religious speech or worship for unique disabilities.

School districts enjoy considerable flexibility in determining what access to allow to their facilities after school hours. What school districts may not do, however, is employ illegitimate criteria to deny equal access. By telling users they may sing religious songs so long as they do not do so from the perspective of worshipers, or that they may teach about Scripture so long as they do not do so from the perspective of a preacher or a catechist, respondents in this case have stepped from permissible forum regulation into unconstitutional discrimination.

b. Establishment Clause fears

Respondents profess grave concern at the prospect of school facilities being used for worship. Opp. at 18-22. This concern has no legal basis and thus can only reflect a persistent prejudice against religious speech.

In Widmar v. Vincent, 454 U.S. 263 (1981), this Court reaffirmed the basic proposition that religious worship, like other religious speech, enjoys constitutional protection, id. at 269. See generally Pet. at 13. While Widmar concerned university facilities, this Court subsequently ruled that allowing high school students to meet in school facilities during school days to "read and discuss the Bible, to have fellowship, and to pray together," Mergens, 496 U.S. at 232 -- i.e., to engage in religious services -- presented no Establishment Clause difficulties, id. at 248-53. A fortiori, the Establishment Clause does not justify discriminatory censorship of worship outside

the school day when community users are otherwise permitted access for the very activities in question (speaking, reading religious materials, singing, sharing concerns).

c. Forum analysis

As this Court has held, the denial of equal access on the basis of a speaker's religious perspective violates the Constitution regardless of forum analysis. Lamb's Chapel, 508 U.S. at 391-92. Here, the unconstitutional viewpoint discrimination is manifest. A community group may mockingly present a worship service (say, in an anti-religious play or lecture), but may not do so from the perspective of believers offering praise to God. A group of devotees may hold a gathering with songs and readings to honor John Lennon, but not Jesus Christ. An instructor may "proselytize" (i.e., teach adherence to) Communism or Deconstructionism, but not Judaism or Islam. Plainly, no forum analysis is needed to show the unconstitutionality of respondents' discriminatory policy.

Respondents therefore err badly when they claim that, "[t]o succeed . . . , the Church must establish that [the] access policy has created a either [sic] designated open forum or a limited public forum encompassing religious worship services," Opp. at 11. As explained above, forum analysis is superfluous. Moreover, respondents' presentation of the issue suffers from multiple analytical defects. First, the petitioner church is undisputably an eligible user, and its planned use undisputably comprises permissible activities (speech, music, teaching). Hence, the question is not whether the forum is open to the use in question -- it clearly is -- but rather whether respondents may bar that use because of its religious aspect (i.e., that the activities will be undertaken from the perspective of believers offering worship). Second, respondents beg the very question:

according to respondents, an excluded user must prove that religious worship is permitted before religious worship will be permitted. See Opp. at 11. Third, respondents ignore the evidence that the school district has approved thousands of community uses, see Pet. at 3-4 (listing examples), evidence which indicates that respondents have indeed created a virtually limitless designated public forum.[2] Thus, with or without forum analysis, respondents' exclusion of certain religious speech runs afoul of the Constitution. Widmar, 454 U.S. at 267-77.

Under the Second Circuit's ruling in this case, the constitutional right to equal access does not apply to religionists in the Second Circuit's jurisdiction. School districts (and courts) must shoulder the unconstitutional burden of identifying and enforcing a difference between religious speech and religious worship, between religious instruction and instruction about religion. Residents face unconstitutional discrimination based on the content and viewpoint of their speech. And the Second Circuit remains at odds with not only the other federal circuits but also the teachings of this Court.

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[2] Respondents assert that "political meetings" and "labor union meetings" are not expressly permitted under the governing New York law. Opp. at 11. But the undisputed facts show that respondents approved both union meetings and a political meeting (a town hall meeting with then-Congressman Shumer) in school facilities. See Pet. at 4; App. at 6a n.3. Hence, respondents' contention illustrates that access to the forum is, if anything, even broader than might otherwise appear.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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